IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1877.

RICHARD P. MORGAN, JR.,
Appellant,
v.
THE CHICAGO AND ALTON RAIL ROAD COMPANY,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR APPELLEE.

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BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
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ARGUMENT.

This suit involves the ownership of two strips of land, each fifty feet in width and about one thousand feet in length, lying one on either side of the right of way of the Chicago & Alton Railroad Company, and forming part of the depot grounds of said Company, in the town of Dwight in the State of Illinois, as shown upon plat marked Exhibit No. I, page 18 of printed record. Appellee claims to own the premises in question as grantee of all the rights and property of the Chicago & Mississippi Railroad Company.

During the years 1853 and 1854, appellant together with James C. Spencer and John Lathrop, were employed by the Chicago & Mississippi R. R. Co. as civil engineers to assist in locating and constructing a railroad from Joliet to Alton. During the same period Kersey H. Fell was employed by the same company to obtain land for the right of way for said road. While so employed, and prior to the location of said road, said Morgan, Spencer, Lathrop, Kersey H. Fell, and Jesse Fell, (a brother of Kersey H. Fell) purchased from the United States four contiguous forty acre tracts on the line of the proposed road, for the purpose of laying out a town, and receiving the benefit of the enhancement in value arising from the location of a station thereon. Said forty acre tracts were entered, one by Morgan, one by Spencer, one by Lathrop, and one by Kersey H. and Jesse Fell jointly. At the time of the entry of said land it was the intention of the parties in interest to locate the depot in the centre of the four tracts of land. In locating the road the line was thrown some distance east of the centre of the four tracts, which caused the depot to be located upon the forty acre tract entered by appellant. Prior to the construction of the road, Spencer, Lathrop, and the Fells conveyed the three tracts entered by them to Morgan, under an agreement that each of said

parties to the original agreement should have an undivided one fourth interest in the proposed town plat, instead of a separate interest as originally contemplated. Morgan was to act as trustee in laying out the town, and in selling and conveying lots. The proceeds of the sales and the unsold lots were to be divided between the parties, in accordance with their respective interests as above stated. In August, 1853, and subsequent to the conveyances above mentioned, Morgan conveyed a right of way one hundred feet in width through the 160 acre tract held by him as trustee, to the C. & M. R. R. Co. In January, 1854, appellant made a town plat of said 160 acres, upon which a strip of land 200 feet wide and 1004 feet long is shown as depot grounds, (p. 14 printed record.) In 1853 or 1854, and prior to the laying of the iron on the road, a plat was made in the right of way or tract book of the R. R. Company, (a book kept for the purpose of showing the land owned by the Company) by Morris, a civil engineer of the Company, from *data* furnished by Spencer and Morgan, upon which plat a strip of ground two hundred feet wide is marked depot grounds, (see plat Exhibit No. I, p. 27 of printed record.) The two strips in controversy lie outside the 100 feet conveyed by Morgan for right of way, and within the limits of the two hundred feet marked upon each of the two plats above mentioned as *depot* grounds. Morgan sold certain of the lots, accounting for the proceeds to the several parties in interest, and subsequently, in 1855, partition was made of the lots remaining unsold, in which partition lots were conveyed to the several parties in interest without regard to the boundary lines of the tracts originally entered by the respective parties, and in the partition no account was taken of the premises in controversy, it being assumed that they were the property of the railroad company.

Subsequent to the making of the plat of Dwight, Spencer located a station upon the ground marked depot, upon the plat, under the belief that the making and recording of the plat "was a good and sufficient deed to the R. R. Co. for all lands "shown on the plat marked either right of way or depot "grounds." (Rec. p. 72.) Prior to the year 1867, the premises in question were unenclosed, and were occupied in part by the tracks, &c., of appellee, in part by the public for purposes connected with railroad traffic, and in part by grain elevators

under license from appellee. In 1867, a controversy having arisen between appellant and appellee, as to whether appellant had dedicated the premises, the question was submitted for decision to the Hon. David Davis and the Hon. Thomas Drummond as arbitrators, who made an award finding that the premises had been dedicated to the public by appellant. (Rec. p. 43.) Notwithstanding the arbitration, appellant commenced leasing portions of the premises, receiving his first rent in 1868, and subsequently, in 1872, sold portions of the same. (Rec. p. 107.) In 1872 Spencer conveyed his interest in said premises to Richard P. Tansey, and the heirs of Lathrop made a like conveyance to appellee. During the same year Tansey, as grantee of Spencer, filed a bill for the partition of the premises in question against Morgan, the Fells and appellee. Appellee filed its answer to the bill, and also a cross bill setting up the dedication of the premises, the submission and award, and also that the facts created an equitable estoppel against the parties claiming to own the land adversely, and praying that appellant and others might be enjoined from interfering with the use and possession of the premises by appellee. Upon final hearing the Court entered a decree granting the relief prayed for by the cross bill, from which decree this appeal is prosecuted. Appellee claims that the decree of the Circuit Court should be affirmed, upon three distinct grounds, viz: dedication, estoppel, and submission to arbitration and award.

I.

THE PREMISES IN CONTROVERSY WERE DEDICATED BY APPELLANT TO THE RAIL ROAD COMPANY.

"No particular form is required to the validity of a dedication. "It is purely a question of intention. *The dedication may be "made by a survey and plat alone, without any declaration, "either oral or on the plat, when it is evident from the face of "the plat, that it was the intention of the proprietor to set "apart certain grounds for the use of the public.*

"An examination of the cases referred to on the argument, will "show, that dedications have been established in every conceiv-

"able way by which the intention of the dedicator could be "evinced. And great importance is frequently attached to the "fact that investments or improvements have been made, either "by individuals, or the public, in reference to a dedication, and "with the knowledge of the proprietor. A dedication must be "understood and construed with reference to the objects and "purposes for which it was made."

Godfrey v *City of Alton*, 12 Ill., 35.
Waugh v *Leech*, 28 Ill., 491.

"The question whether a person intends to make a dedication "of ground to the public for a street or other purpose, must be "determined from his acts and statements explanatory thereof, "in connection with all the circumstances that surround and "throw light upon the subject, and not from what he may sub- "sequently testify as to his real intent in relation to the matter. "And this is on the principle that the public have the right to "suppose that a man intends what his outward conduct and "statements indicate, inasmuch as they cannot discover his in- "tention in any other manner."

The City of Columbus v *Dahn*, 36 Ind., 330.

By the Statutes of Illinois in force at the time of the making of the plat by which it is claimed the premises in question were dedicated, it is provided that "the plat or map when made out, "certified, acknowledged and recorded, as required by this divis- "ion, and every donation or grant to the public, or any indi- "vidual or individuals, religious society or societies, or to any "*corporation* or bodies politic, marked or noted as such on "said plat or map, shall be deemed in law and in equity a suffi- "cient conveyance to vest the fee simple of all such parcel or "parcels of land as are therein expressed, and shall be consid- "ered to all intents and purposes as a general warranty against "such donor or donors, their heirs and representatives, to the "said donee or donees, grantee, or grantees, for his, her or "their use *for the uses and purposes therein named, expressed "or intended* and for no other use or purpose whatever."

Revised Statutes 1845, Chap. 25, Sect. 21.

Under this statute it was competent for appellant to dedicate the premises in question to the C. & M. R. R. Co., which is admitted to have been a corporation, and it was not necessary that the dedication should be expressed, but it is expressly provided

that the dedication shall be operative for the uses and purposes 'therein named, expressed or *intended.*"

The plat in question was made out, certified, acknowledged and recorded in conformity with the statute. (Printed record, pp. 22, 26, 42, 43 and 47.)

On the 6th day of August, 1853, appellant conveyed to the C. & M. R. R. Co., 50 feet on each side of the center line of said company's railroad as the same runs through or across the Northeast quarter of Section 9, Town 30; also the Southeast quarter of Section 18, same town, &c., "subject to the following "covenants of the said party of the second part, to wit, said "company agree to keep up perpetually good and sufficient fen- "ces on either side of said road, so far as the same runs through "or across either of said tracts, whenever the same is reduced "to cultivation; said company also agree to construct and keep "up on the last mentioned tract the necessary crossings for the "use of said land, not exceeding ——— in number; and should "the former tract be laid off into town lots, to make safe and "substantial crossings wherever the line of said road intersects "the streets that may be laid out on said land; said company "further agree in consideration of the premises, to erect and "keep up station houses and other necessary depot buildings on "said first mentioned tract, and also at the Town of Pontiac, "of said county." (P. R., p. 42.)

On the 30th day of January, 1854, nearly six months after the execution of the above deed, and before the iron was laid or the depot located, the plat of the town of Dwight was made, upon which the center line of the right of the way is shown, and the premises in question are marked "depot," and the distance from the outside boundary line of the tracts to the center of the right of way, viz: 100 feet, is marked in four places. The width of the strip lying outside of the right of way, viz: 50 feet, is not marked upon the plat at all, neither is the width of the right of way noted thereon. It will further be noted that if the two strips in question were private property, the depot building would be inaccessible from any street, and could only be reached by following up the track on the right of way for a distance of five hundred feet. About the same time, upon the tract book of the company, a plat was made from data furnished by Morgan and Spencer, and under their direction, showing the premises as the

property of the company, and marked depot grounds, with no line separating the right of way from the premises in question. (P. R., p. 27.)

The testimony of Morris in regard to this plat is as follows:

"Int. 2. What was your occupation in 1853 and 1854?

"Ans. I was general assistant and draftsman in the office of "the Chicago & Alton engineering department, then called the "Chicago and Mississippi Railroad.

"Int. 11. State what were your duties at this time, at the "time of the location of the road?

"Ans. I had charge of the office. I had the handling of all "papers relating to the construction of the road, the making of "maps, profiles, plans of mechanical structures, depot buildings, "and right of way maps, and acted as general assistant.

"Int. 12. Where did you obtain the data for making said "maps—from whom?

"Ans. From the resident engineers and from the chief engi- "neer.

"Int. 13. State by whom the map now shown you, marked "Exhibit one" of your deposition was made, when it was made, "and from whom you received the data to make the same?

"Ans. It was made by me. I can't positively tell whether "it was '53 or '54; it was one of those two years. I received "the data from Spencer and Morgan.

"Int. 14. For what purpose was this map made?

"Ans. For the purpose of showing the company's land as "required for right of way and operating purposes through the "different subdivisions of the United States surveys, to be a "permanent record for the use of the company, showing its "property along the line of the road.

"Int. 15. State whether or not Richard P. Morgan, Jr. and "Spencer at any time saw this map; if so, how often and when?

"Ans. I have no doubt they saw it frequently, as those "gentlemen were in the habit of coming to the office where I "made this map.

"Int. 16. Did they know for what purpose the data furnished "by them were used?

"Ans. Perfectly.

"Int. 18. State whether other maps were made showing the

"right of way and depot grounds of the other portions of this "road?

"Ans. Yes.

"Int. 19. By whom?

"Ans. By me.

"Int. 20. Who furnished the data for such maps?

"Ans. The chief engineer and residents.

"Int. 21. State whether or not the data for this map, marked "Exhibit one" was furnished before or after the construction "of this part of the road?

"Ans. It was furnished before the iron was laid.

"Int 29. What reason have you for being confident that "Spencer and Morgan saw this map marked "Exhibit one"?

"Ans. For the reason that I got the data from which I "made the map from them, and that they were frequently in "the office where all such maps were prepared, and saw the "work that I was engaged on.

"Int. 30. State whether or not any of the parties interested "in said town site ever objected to this map?"

"Ans. They never did so far as I know of." (P. R. pp. 82–4.)

Morris' deposition was taken Dec. 29, 1873.

Appellant's deposition was taken on his behalf July 17, 1874, in which he does not seek to explain or deny any of the statements testified to by Morris. The statements made by Morris stand unqualified, if not conceded upon the record in this cause.

James C. Spencer, one of the parties to the original purchase, testified:

"Q. Please state how it was that you and Morgan and the "Fells and Lathrop came to be interested together, concerning "the location of the Town of Dwight, and of the railroad across "these four forties, and the history of that matter, and how from "time to time each party was interested?

"A. Morgan, Lathrop and myself were engineers on the "road, and had these lands entered for the money to be made "on them by the increased value which the construction of the "road would give them. My recollection is that the two Fells "were associated with us, as they were land agents familiar "with land and land entries, and we considered that their ser-"vices would be valuable to us, and they were men of standing

"and integrity. After the road was located, I think in the "summer of 1853, I deeded my forty to R. P. Morgan, Jr., in "trust, and I presume the others did, I have always understood "the others did, for the purpose of making the 160 acres of the "four forties into a town, which we afterwards called Dwight. "Morgan held my land in trust, and I suppose he did the others, "until some time in 1855, I think, when the lots remaining "unsold by the trustee were divided between the four parties; "the lots deeded to me lay in each of the forties, that is, I had "some in each of the forties. The lots which were sold by "the trustee were accounted for, or my share, either by money "or note, or both.

"Q. Was there any, and what, if any, understanding at any "time between you and Morgan, or the other parties, with ref- "erence to the railroad interest, and what it was to be in the "lands embraced within the town of Dwight?

"A. I don't recollect any conversation on the subject with "Morgan, or any of the parties, but supposed when the R. R. sta- "tion was located there, ample grounds were to be given the R. "R. Company for the transaction of their business, and sup- "posed at the time of making the plat, and for some time there- "after, and until this matter was first brought to my notice, "that the recording of the plat was a good and sufficient deed "to the R. R. Co. for all the lands shown on the plat marked "either right of way or depot grounds. Had I not thought so "it would have been my duty as engineer of that division, to "have seen that the R. R. Co. had a proper deed.

"Q. Concerning the same subject, state whether Mr. Mor- "gan was under any duty to the R. R. Co., and how that duty "arose if at all; please state the facts?

"A. Morgan being employed by the R. R. Co., and being "allowed as well as myself to be interested in stations, should "have protected the R. R. Co. that made these stations "valuable.

"Q. Do you remember that on the block or square in which "the depot grounds are situate in the town of Dwight, there is "a strip of land on each side of the R. R. Co.'s right of way, "of about 50 feet in width, and running diagonally and extend- "ing from Mazan Avenue to Chippewa street?

"A. I recollect a strip of land on each side of the right of "way, about 50 feet in width.

"Q. Please state how these two strips of land were treated "in the division between you and Morgan and Lathrop and "the Fells when Morgan deeded in 1855?

"A. So far as I was concerned, no part of these strips "were deeded to me; I regarded them as belonging to the R. "R. Company.

"Q. Suppose the R. R. Co. not to have acquired any rights "in those two strips, how did your interest therein differ from "your interest in the lots which were the subject of division?

"A. I don't think I ever could have had any interest in "them, as I think the R. R. Co. acquired the right to them, "and paid well for them.

"The points through which the R. R. was to run were fixed "by the chief engineer, Oliver H. Lee, and we had his permis- "sion to locate stations between these principal points where it "was for the best interests of the railroad company. My un- "derstanding with Mr. Lee was that the R. R. Co. should have "ample grounds for the transaction of their business when we "located stations."

"Q. From whom, according to your understanding with Mr. "Lee was the R. R. Co. to have grounds for the transaction of "their business?

"A. Well, from such of us as owned the tract of land on "which he located the station." (P. R. pp. 71–74.)

Jesse W. Fell testified as follows:

"Q. What was your business in '53–4?

"A. I was at that time engaged in farming and real estate "business, and a part of the time acting as the agent of this "company, getting the right of way for the Chicago and Alton "road north of Bloomington.

"Q. In making this arrangement between Col. Morgan and "yourself and the others for this undivided quarter interest "in the four forties, was any reservation of any part of the "property from that arrangement made by Morgan of any "property? That is, did Col. Morgan put in his whole forty, or "only part, into the arrangement you have spoken of?

"A. My understanding was that he put in all except such "portions as had been dedicated or given to the railroad, in-

"cluding the right of way and the additional fifty feet on either "side marked 'depot grounds.'

"Q. Notwithstanding the property deeded to the railroad, "and notwithstanding the additional fifty feet on each side, did "Col. Morgan receive without deduction his full quarter share "in the division of the whole property?

"A. That was my understanding.

"Q. If the two strips of fifty feet each on each side of the "railroad grounds had been in the market for sale or disposi- "tion, what would have been your and your brother's propor- "tion of the outcome arising from such sale or disposition?

"A. One fourth part, but I did not suppose that it was a "fair subject of sale or disposition by anybody, believing it had "been conveyed or agreed to be conveyed to the road.

"Q. Did Col. Morgan ever inform you prior to the time of "the division of interests, that the railroad company was not to "have the benefit of these fifty feet?

"A. He did not; at least I have no recollection that he "did.

"Q. Did he inform you that he expected to receive any "compensation for that property of the railroad?

"A. He did not, prior to the division.

"Q. How long afterwards was it that he made any such "claim, to your knowledge?

"A. Not until within the last year or two, as I now recol- lect.

"Q. What was the occasion of Col. Morgan making any "claim, so far as you remember, and what was said by him, "and when?

"A. The time or times I do not recollect, but I think that "within the last six months, in talking with him on the subject, "as a reason why he had not made a deed to the additional "strips of fifty feet, he urged that the railroad company had "failed in their agreements with him in making the necessary "crossings, as I understood it.

"Q. What crossings?

"A. As I understood him, it was the street crossings, and "possibly crossings outside of the town.

"Q. At the time you accepted the division in 1854 or '55, "and at the time you made the allotments of parcels for your-

"self and your associates, did you take into account the two "fifty feet strips in question?

"A. We did not.

"Q. Why not?

"A. Because as I supposed, we all regarded it as railroad "property, as I did not know at that time of any failure on the "part of the company to comply with the conditions upon which "Col. Morgan had given or agreed to give the grounds, or the "right of way.

"Q. Why did you suppose the railroad company were to "have these lands?

"A. Because they had located their depot on our grounds, "or rather surrounded by our grounds, thereby enhancing their "value.

"A. Looking at the interests of the parties as affected by "the location of the depot, I have always supposed that good "faith on our part demanded that these strips should belong to "the railroad, not knowing that any conditions were imposed or "violated except as already stated.

"Q. As between the parties to the agreement, independently "of the railroad, how does the claim of Morgan for the whole "interest in the two strips, instead of a quarter interest therein, "comport, or agree, or disagree with the contract between him "and yourself and the others?

"A. From my recollection of that agreement, I would say "that if there was any property that had not been divided in ei- "ther one of the four forties, it would be a fair subject for di- "vision among the four interests, but I do not claim that there "is such.

"Q. Why do you not claim that there is such?

"A. Because all the property not dedicated as I had supposed, "has been livided.

"Q. What property do you refer to as property you sup- "posed had been dedicated?

"A. Property marked as for streets, alleys, depot grounds, "right of way, including the two fifty feet strips in question." (P. R. pp. 77–81.)

L. G. Pearre and J. H. Coe testified that they were in the grain business in 1863 and '4, in Dwight, and had their corn cribs and scales and part of their building used for storing grain

upon the east strip in controversy, and that teams drove across the east strip in going to and from their cribs and warehouse, that Morgan never made any claim to them of ownership of the premises in question, and never heard of his claiming any interest in the premises until 1868. (P. R., pp. 87-90.)

Lewis Kenyon testified he had lived in Dwight for seventeen years, and had known Morgan since 1857; that he knew the location of the premises in controversy.

"In the year 1857-8 they were occupied by the Chicago and "Alton Railroad Company, in part by a tenant house or section "house and were used by the company with others, as a place for "loading and unloading stone, lumber and freight generally, "and also a portion of them were used and occupied by cribs "and warehouse owned by John C. Spencer, and occupied by "Spencer, Coe and Pearre, the two last witnesses, during 1858, "'59 and '60, and in 1858 and '59 there were other cribs on the "east strip near the corner of the big warehouse, one owned by "Col. Morgan and the other by James Ross.

"The first objection that I ever heard him (Morgan) interpose "was when the section house owned by the railroad company "was still standing on the premises, and Mr. Morgan claimed "that the use was not in compliance with the grant made to the "railroad company; that the town was laid out, and the village "lots for the purpose of realizing money from their sale, and if "the railroad company were allowed to cover it with Irish "shanties it would prevent the sale of a corresponding number "of lots, and that he should require the company to remove the "section house from the premises, which was done, I should say, "about 1860 or '61."

The section house was used at the time by the section boss, I think, as a home and a boarding house for the section hands.

Int. 9. "Did he at that time claim to own this strip himself?"

A. "He did not."

Witness further testified that in 1867 he was village attorney for Dwight, and in a conversation with Morgan in regard to two small tracts of land called east and west parks, but not so designated upon the town plat, the witness said, "Col. Mor-"gan, I think this is a new idea of yours, and that you intended "to convey the parks to the town of Dwight, and the strips of "ground to the railroad company." Col. Morgan then rejoined:

"It was my intent that they should have those lands, and they "would have had them had they behaved themselves properly "and have done as they agreed to on their part." (P. R. pp. 90–91.) Cross-examination of this witness was waived, and the defendant whose testimony was subsequently taken, did not deny that the above conversation was correctly stated by the witness.

David McWilliams testified that he had lived in Dwight almost twenty years, and had known Morgan for nineteen years; that he knew the location of the strips in question, and that prior to 1868 they had been used and occupied for elevator purposes and unloading lumber, stone, coal and merchandise from the railroad, and that in earlier years there were a number of corn cribs on them; that in the year 1854 witness had a corn crib on the premises; stood there about three years. About the year 1858 or '59, purchased a corn crib of Mr. Morgan, and it remained there until excavations were commenced for the McPherson elevator, three or four years, also purchased corn crib of James L. Ross, just by the side of the other crib, and about the same time, which remained until removal, at the same time with the other, and that the ground south of the McPherson elvator was used for a lumber yard in common with others. That at the time Morgan sold the crib to witness, he did not make claim to the ground on which it stood, nor to any part of either of the strips. That the first positive date that witness heard from Morgan that he claimed an interest in the premises, was February 7th, 1869. that the first time Morgan asked witness for compensation for use of said premises was a short time before February 7th, 1869.

The depot building is situated about midway between the north and south ends of the strips in controversy, about the middle of the grounds. Prior to 1870 there was no other means of access to the depot from East street or West street, except across these strips. In the partition between Morgan, Spencer, Lathrop and the Fells, the premises in question were not taken into consideration. (P. R. 92–4.)

Nelson Cornell testified that he had resided in Dwight since October, 1854. Knows the location of the premises in controversy, and has known Morgan for 24 years. "The first conver- "sation we (Morgan and witness) had in regard to anything "about these pieces of land, I was roadmaster at the time; it

"was after he built his house. I think along in '56 or '57. His "house was near one of the strips, and he applied to me to have "a crossing put in and filled on Chippewa street. I told him "that it would take a good deal of material, and I was not au- "thorized to do it without orders from headquarters. He then "stated that he had given the road the right of way 100 feet "through the entire land, and 50 feet more on each side for a "thousand feet long, and that they on their part were to build "depot buildings, crossings, and keep them up for all time to "come." (P. R. 94-5.)

The appellant testified as follows on his own behalf:

"Int. 68. Will you state what your intention was when you "made the plat of Dwight?

"Ans. I set them apart with a view to the ultimate needs of "the railroad company at this station; and it was my intention "if the Chicago and Mississippi R. R. Company faithfully per- "formed the covenants contained in my deed of the 100 feet to "them, the performance of which materially affected the value "of a large property that I owned adjoining the south end "of the town: "To convey to that Company for a nominal "sum of money the two strips of land to the Mississippi Com- "pany for its use, but there never was any thought of dedicating "the property. *That reservation, in my own mind and for my "own protection, was made because my interests were sacrificed "by the failure of the Chicago and Mississippi Company to "perform the covenants.*" (P. R., p. 103.)

From 1854 to 1863 passengers went across these strips for the most part to get to the depot, and teams crossed these strips in shipping and receiving freights. The street, 30 feet in width, extending across both strips from East street to West street, was laid out in 1873. (P. R., pp. 109 and 99.)

In the agreed statement of facts, signed by the parties to this suit in October, 1867, it is stated that since the recording of the plat of the town of Dwight, no taxes had been paid by either party on the two strips in question; that the Chicago and Alton Railroad Company had a track or tracks on the westerly strip of land since some time in 1863, and that the two strips had been uninclosed and portions of them used by the public for purposes connected with railroad traffic, while other po. tions of the east

erly strip had been occupied by buildings without the consent or authority of Morgan thereto, and in one case under a license granted by the Superintendent of said Railroad Company, for a grain elevator or warehouse. (P. 41.)

This agreed statement of facts is supported by the testimony in this case, and correctly represents the condition of this land up to 1867, prior to which time Morgan had not received any rent for any portion, or had he ever claimed any such rent prior to 1865, nor did he make any effort to sell any portion of these strips until January, 1872, as shown by his own testimony, although he commenced selling lots in the town plat immediately after the laying out of the town in 1854.

The testimony of the witnesses shows clearly and beyond question that the parties laying out the town of Dwight bore a fiduciary relation to the Chicago and Mississippi Railroad Company, that it thereby became their duty to protect the interests of said Company; that the land included in the town plat was entered at Government price for the purpose of realizing the enhanced value given thereto by the location of a station thereon, the location of which station they were able to control by reason of their position of trust in the employ of the Railroad Company; That it was the duty of said parties before locating the depot to see that ample grounds were secured for the use of the Railroad Company; That upon the Right of Way or Tract Book of the Railroad Company the premises in question were platted and recorded under the instructions of the parties owning the land, as the property of the Railroad Company, and were designated upon the town plat as "depot grounds;" That the location of the depot was in fact secured by the designation of these strips as depot grounds, the same being relied upon as a conveyance or dedication of the land to the Railroad Company; That the parties received large sums of money from the sale of lots which derived their value from the location of the depot upon the premises in question; That, in the partition of the unsold lots in the town plat, no account was taken of the premises in question, they not being regarded by the parties in interest as subject to division, or as land in which they had any ownership or title; That the depot building was so situated that no convenient access could be had thereto except by crossing the strips in question; That these premises were used by passengers

in going to and from the depot, and by parties shipping and receiving freight, without objection, for at least twelve years; That no taxes were paid upon these strips prior to 1867, and that appellant made no claim of ownership or for rent for the use of said premises prior to 1865, and made no effort to sell any portion of said strips prior to 1872.

Do these facts prove any intention on the part of appellant to dedicate the premises in question to the Railroad Company? We think this question must be answered in the affirmative, as it was in the court below. Even appellant himself testifies it was his intention to convey to the Railroad Company the two strips of land in question for a nominal sum, if the Company faithfully performed the covenants contained in his deed of one hundred feet to them, adding: "that reservation, in my own mind and "for my own protection was made, because my interests were "sacrificed by the failure of the Chicago and Mississippi Com-"pany to perform the covenants." It will be noted that the reservation in appellant's mind was because of the failure of the Company to perform the covenants of the deed, but at the time the plats of the town of Dwight were made, the railroad tracks had not been laid, and there had been no failure to perform the covenants of the deed. The reservation growing out of the failure to perform the covenants, could not therefore have been in the mind of appellant at the time the plats were made. The intention to dedicate was manifested by appellant by the plats and by his other acts in connection with the manner in which the property was used, and he cannot now avail himself of a *mental* reservation, which had no existence until long after the dedication had been accepted and acted upon, and which was kept within his own breast until more than ten years after the depot had been located. It was the duty of appellant and his co-tenants, engineers of the railroad company, to provide ample grounds for depot purposes. The premises in question were intended for this purpose. This intention was declared upon the town plat, and upon the right-of-way books of the Company. The location of the depot by the Company, based upon these representations, has been the source of great profit to appellant. It is now too late for appellant to plead any *mental* reservations. If the Railroad Company was guilty of any breach of covenant, appellant had his right of action against it, but he cannot make

any such alleged breach of covenant the basis for defeating or impeaching his own act in giving the premises in question to the Railroad Company. It is impossible to believe that if appellant and the other engineers of the road had not regarded the strips in question as a part of the depot grounds, that they would have located the depot building in the centre thereof where it could not be reached by a street from any direction, but would necessitate the crossing of private grounds to reach the depot or the passing along the railroad track on the right-of-way for a distance of five hundred feet.

It is impossible to believe that these strips, so valuable, by reason of their contiguity to the depot, would have been wholly ignored without cause in the partition between the co-tenants of the property included in the town plat. It is impossible to believe that appellant would have allowed these premises to be used for corn cribs, warehouses, lumber yards, and other purposes connected with railroad traffic, for a period of more than ten years, without demanding any rent or setting up any claims of ownership and that heshould himself have sold a corn crib situated upon one of these strips without making any claim to the land upon which it was situated, or making any conveyance of such land, or claim for rent, or arrangement for a lease to the party to whom the crib was sold, if he had believed that he was the rightful owner of the land. It is impossible to believe that appellant, if he had not regarded these strips as belonging to the Railroad Company, would not have paid taxes upon them prior to 1867, or in his anxiety to realize from the sale of property, should have made no effort to sell any portion of either of them prior to 1872, although from their location, if subject to sale, purchasers could easily have been found.

II.

APPELLANT IS ESTOPPED FROM CLAIMING ANY INTEREST IN THE PREMISES IN CONTROVERSY AS AGAINST APPELLEE.

The doctrine of estoppel is thus defined by Judge Breese, in "the case of *People* v. *Brown*, 67 Ill., 435. "That when a per-"son by his words or conduct voluntarily causes another to

"believe in the existence of a certain state of things, and induces "him to act upon that belief so as to change his previous posi- "tion, he will be estoppel to aver against the latter a different "state of things."

In *Knoebel* v. *Kircher*, 33 Ill., p. 315, the Court say: "Estop- "pels *in pais* are to prevent injuries from acts and representations "which have been acted upon, a declaration, to constitute an es- "toppel, must be one, the injurious influence of which might and "ought to have been foreseen, it must be acted upon in good "faith, and the person acting upon it, must have changed his "situation so that injury would result to him if the party making "the declaration were allowed to retract it."

In *Baker* v. *Pratt*, 15 Ill., p. 571, the Court say: "*A verbal* "statement is sufficient, where the party has made an admis- "sion which is clearly inconsistent with the evidence he proposes "to give, or the title or claim which he proposes to set up, and "the other party has acted upon the admission, and will be in- "jured by allowing the truth of the admission to be disproved."

In the case of *Mills* v. *Graves*, 38 Ill., p. 465, the Court say: "When a party stands by and sees another acting to his injury, "and the owner declares that he has no claim, equity will not "permit him afterwards to assert his title, to the injury of the "person he has thus misled. And cases may be found where "mere silence, by the true owner being present and failing to "assert his right, when he sees a person purchasing the prop- "erty, has been held to create an estoppel, but to operate as a "bar to the assertion of his right, the acts of the owner must "contribute to the injury of the person relying upon the bar be "fore he can be estopped"

In *Smith* v. *Newton*, 38 Ill., p. 235, the Court say:

"A much broader scope has been given to the doctrine of "estoppels *in pais*, both in this country and in England, than "formerly obtained, and have established, that whenever an act "is done or a statement made by a party which can not be con- "tradicted or contravened, without fraud on his part, and injury "to others whose conduct has been influenced by the act or ad- "mission, the character of an estoppel will attach to what would "otherwise be mere matter of evidence, and it will become bind-

"ing upon a jury even in opposition to proof of a contrary na-
"ture." 2 Smith, Leading Cases, 542 (top paging), as was
"said by the Court in *Dazell* v *Odell*, 3 Hill, N. Y., 219: "In
"order to create an estoppel *in pais*, or equitable estoppel, as
"now understood, there must be an admission intended to in-
"fluence the conduct of the man with whom the party is dealing,
"and actually leading him into a line of conduct which must be
"prejudicial to his interests, unless the party estopped be cut
"off from the power of retraction."

To the same effect the *International Bank* v. *Bowen*, 80 Ill., p. 545. In *Higgins* v. *Ferguson*, 14 Ill., 270, the court say.

"There is no principle better established in this court, nor
"one founded on more solid considerations of equity and public
"utility, than that which declares, that if one man knowingly,
"though he does it passively, by looking on, suffers another
"to purchase and expend money on land, under an erroneous
"opinion of title, without making known his claim, he shall not
"afterward be permitted to exercise his legal rights against such
"person. It would be an act of fraud and injustice, and his con-
"science is bound by this equitable estoppel."

In the case at bar, all the elements of an equitable estoppel are found to concur. The plat made upon the right of way book of the Railroad Company, is shown by Morris to have been made from data furnished by appellant and his co-owners, in their official capacity as engineers of the road. By his testimony it further appears that they knew of the making of this plat, and of the purposes for which it was made, and his testimony in this regard stands uncontradicted by appellant, who subsequently testified on his own behalf. By this plat appellant and his co-owners made a deliberate representation to the company that the land in question was the property of the company. The same representation was made upon the town plat by the same parties.

It further appears from the testimony of Spencer, one of the co-tenants of appellant, that in locating the Railroad Station, as one of the engineers of the road, he relied upon the plat as a good and sufficient deed to the company, of all the land shown in the plat either marked "Right of way," or "Depot Grounds," and that had he not so regarded it, it would have been his duty as engineer of that division to see that the Railroad Company had a proper deed, and that it was the duty of

appellant as well as of himself, being allowed to be interested in stations, to protect the Railroad Company in regard to their depot grounds.

It further appears from the evidence that the Railroad Company have side tracks, and coal houses, and other improvements necessary to the carrying on of their business, located on the premises in question.

It is undisputed that the premises in question were marked upon the plats and treated by the parties as depot grounds, for the purpose of securing the location of a station at that point, and thereby securing the enhancement in value of the adjoining property owned by the parties who made the plat.

We have, then, all the elements enumerated in the cases above cited as are necessary to create an estoppel.

First. There was a representation concerning material facts, to wit: a representation upon the right of way book of the Railroad Company, that the premises in question were owned by the company and were a part of its depot grounds.

Second. The representation was made with a knowledge of the facts. It is not pretended that appellant did not know all the facts at the time the plat was made.

Third. The representation was made with the intention that it should be acted upon. The plat was made as a part of the permanent records of the Railroad Company for the purpose of guiding the action of the officers of the company in locating the road and its stations, and in operating the road.

Fourth. The representation was acted upon without any knowledge that it was not true. Spencer expressly testifies that he acted upon it, and at the time believed it to be true—that the land was owned by the Railroad Company for depot purposes.

Fifth. Injury would result to the Railroad Company were appellant allowed to deny the truth of the representation that the company was the owner of the property. Improvements have been made based upon the supposed ownership of the premises, which would be lost or become valueless if appellant were allowed to assert his ownership of the premises

In this case we have the additional element that appellant was acting in a relation of trust and confidence, which bound him to protect the interests of the Railroad Company, and that

his representations were made to secure the location of the station, and thereby enhance the value of his other property, and that he has in fact, by means of the action of the Railroad Company, based upon his representations, received large profits from the sale of lots in the town of Dwight. Certainly, it would be a fraud to allow appellant to deny that the premises were the property of the company after having received the benefit of the enhancement in value of his property, by virtue of the action of the company in locating its depot, based upon the representation of appellant, that the premises were the property of the company.

Before the railroad was built the land included within the town plat was unentered Government land.

It received nearly all its value from the location of the station upon the premises in question. The engineers of the road were permitted to control the location of this station, subject only to the condition that ample depot grounds should be provided for the road.

It is admitted that appellant and his associate engineers availed themselves of this privilege. Appellant admits in his testimony that it was his intention that the premises in question should ultimately belong to the Railroad Company. This intention was declared upon the records of the company by the plat made by Morris, without any qualification or reservation. This declaration of ownership in the company by appellant having been acted upon by appellant, cannot now be denied by appellant, when such denial would result in injury to the Railroad company.

III.

THE AWARD BY JUDGES DAVIS AND DRUMMOND ON THE SUBMISSION TO ARBITRATION BY APPELLANT OF HIS RIGHTS IN THE PREMISES, IS A BAR TO HIS CLAIMING ANY INTEREST IN THE PREMISES.

On the 9th of October, 1867, appellant and appellee by an instrument under seal, submitted their disputes in regard to the premises in question, to the arbitrament and final determination

of the Hon. David Davis, and Hon. Thos. Drummond, and thereby agreed that the award of said arbitrators should be final and conclusive, both at law and in equity, as to the question at issue between the parties. In the articles of submission it is not stated what the points in dispute were, but in a statement of facts attached to the submission and referred to therein, the claims of the respective parties were stated as follows:

"The Chicago and Alton Railroad Company now claim that "the record made by Morgan in January, 1854, was a dedica- "tion of the two strips of fifty feet each, lying on either side of "the one hundred feet deeded by him, Morgan, to the Railroad "Company on the 6th of August, 1853, and claim the right to "occupy and use the same for depot purposes, in common with "the public. Morgan claims that his map and record of Janua- "ry, 1854, do not constitute a dedication of either of the fifty "feet strips."

The award rendered was as follows: "We have considered "the question submitted to us by the parties in this case upon "the agreed statement of facts, and the arguments of counsel, "and are of opinion that the grant made by Mr. Morgan of the "right of way to the Railroad Company in 1853, and the survey, "platting and recording of the town of Dwight in 1854, the "running of streets along the disputed strips of land, and the "laying off of lots abutting on the same, and fronting on "the railway, in the manner set forth in the said plat and rec- "ord, together with the conduct of Mr. Morgan, touching the "said strips of land since the year 1854, do constitute a dedica- "tion of the same to the Public. We give no opinion as to the "manner in which the two strips of land can be used either by "the Railroad Company or the Public.

"Thomas Drummond,
"David Davis."

(P. R. p. 43.)

It will be observed that in the award the arbitrators consider that but one question was submitted to them, upon the agreed statement of facts, and the argument of counsel, namely, whether the premises in controversy had been dedicated by appellant. In the statement of facts attached to the submission, there is but one point on which there is a conflict between the parties—

the Railroad Company claim a dedication of the two strips; Morgan claims there was no dedication of the two strips.

So far as appears from the papers before the arbitrators this question of whether or not there was a dedication, was the only question at issue between the parties. It did not appear that Morgan disputed the right of the Railroad Company to use and occupy the premises for depot purposes, in common with the public or otherwise, provided the premises had been dedicated. It would not have been proper to have submitted, or for the arbitrators to have passed upon, the rights of the public in the premises in a proceeding to which the public was not a party. Morgan was asserting title to these premises. The Railroad Company disputed his title, claiming that he had dedicated the same. If there was a dedication of the premises, then appellant had no special or peculiar interest therein.

The settlement of the question of dedication would settle all disputes between the appellant and appellee. Appellant was not claiming, and had never claimed, that the Public had any rights in the premises as against appellee. The sole and only question disputed with appellant, was: Did appellant own the premises in question, or had he parted with his title thereto by dedication? This was the question submitted in the agreed statement of facts, and it was the question passed upon by the arbitrators.

The award was as broad as the submission taken in connection with the agreed statement of facts, attached thereto and made a part thereof, and this award was, by agreement between the parties, to be final and conclusive at law and in equity upon the point at issue between the parties. To wit: The dedication of the premises by Morgan. The award having been rendered in pursuance of the submission, in conformity with its terms, and while it was unrevoked, is binding upon appellant and is a bar of the claim of appellant to any interest in the premises in question. He is estopped by the finding of the arbitrators from denying that the premises were dedicated by him.

But it is urged by appellant that the decree entered in a suit instituted by David McWilliams and James H. Hagerty in the Circuit Court of McLean County, dismissing a bill in chancery, setting up and claiming that the making of the town plat of Dwight was a dedication of the premises in question to the pub-

lic, and seeking to enjoin appellant from erecting any building thereon, which decree was affirmed by the Supreme Court of the State of Illinois, in an opinion holding that the making of said town plat did not constitute a dedication of said premises to the public, is a bar to the claims of appellee, upon the ground that appellee contributed to the expenses of said litigation.

It is a sufficient answer to this position to state, that the questions raised by this suit were not, and could not have been raised, tried or decided in the suit in McLean County. The question as to whether the town plat in connection with the plat on the right-of-way book of the company, together with the acts of appellant in his official connection with the Railroad Company, constitute a dedication of the premises to the Railroad Company, was not and could not have been tried or determined in a proceeding to which the Railroad Company was not a party.

So also the question of equitable estoppel, and of the bar of the submission to arbitration and award were not and could not have been decided in the suit in the State Court. The sole question presented in that case was one of dedication to the public, and not the right of the Railroad Company in the premises.

Neither the parties, the evidence, nor the questions presented and decided were the same in the suit in the State Court as in the case at bar. The only question decided by the State Cour was that the facts presented for its consideration did not show that the premises were dedicated to the public. In this case we do not base our claim to relief upon a dedication to the public, nor does our case rest solely or mainly upon the evidence presented to the State Court.

Appellant has introduced into the record a plat showing the occupation of the premises in 1874. Clearly the questions of dedication and estoppel can not be affected by acts done since 1867, when the dispute in regard to the ownership arose. If appellant is by his acts estopped from asserting title to the premises he cannot defeat the estoppel by showing that he has taken possession of the premises. We respectfully submit that, upon the facts shown by the record, equity and justice require that the decree entered by the Circuit Court in this case should be affirmed.

JOHN P. WILSON,

Attorney for Appellee.

79 Ill 324
77 Ill 330
64 Ill 95

O'Reilly
vs
Edmonston
6 Otto 724

A motion, no
record.